Wireless Services (Claircom) and GTE Airphone, Inc. (GTE) claiming breach of contract, negligent misrepresentation, fraud and violation of the Washington Consumer Protection Act.[30] Claircom and GTE provide air-to-ground radiotelephone services for passengers on commercial aircraft.[31] Appellants claimed the companies were liable because the promotional materials provided to passengers aboard aircraft did not disclose the companies' practice of rounding up airtime.[32] The trial courts dismissed both appellants' actions ruling their claims were preempted by 47 U.S.C. sec. 332(c)(3)(A) and barred by the filed tariff doctrine.[33] The Court of Appeals affirmed on the same grounds.[34]

Filed Rate or Filed Tariff Doctrine[35]

The "filed rate" doctrine, also known as the "filed tariff"[36] doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of

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[30] *Hardy*, 86 Wash. App. at 489-91.

[31] *Id.* at 490.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112 (S.D.N.Y. 1992) *aff'd*, 27 F.3d (2d Cir. 1994) for a comprehensive history of the doctrine.

[36] "Tariff" is defined as "Schedules of rates and regulations filed by common carriers." 47 C.F.R. 61.3(ii) (1997). Courts commonly use "filed rate" to refer to a tariff.

the filed rates.[37] This doctrine provides, in essence, that any "filed rate" a rate filed with and approved by the governing regulatory agency is per se reasonable and cannot be the subject of legal action against the private entity that filed it.[38] The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.[39] These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices.[40] But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.[41]

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[37] *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994).

[38] *Id.*

[39] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[40] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S. Ct. 2759, 2766, 111 L. Ed. 2d 94 (1990).

[41] *Kansas City S. R. Co. v. Carl*, 227 U.S. 639, 653, 33 S. Ct. 391, 395, 57 L. Ed. 683 (1913) ("Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper"); *See also Marco Supply Co. v. AT&T Comm's., Inc.*, 875 F.2d 434 (4th Cir. 1989) (doctrine precludes claim of price misrepresentation); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) (en banc) (allegedly overcharged or defrauded customers suffered no cognizable injury because of filed rate); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687 (Tex. App. 1996) (doctrine bars action for various allegedly anticompetitive practices committed by long distance provider).

Courts have construed the "filed rate" doctrine broadly in dismissing lawsuits against telecommunications carriers involving direct or indirect challenges to the reasonableness of rates. In *Marcus v. AT&T Corp.*, subscribers to AT&T Corporation's long distance telephone service brought class action lawsuits in the United States District Court claiming fraud, deceptive acts and practices, false advertising, negligent misrepresentation, and other state law actions for the company's alleged practice of rounding up call charges without adequate disclosure.[42] In addition to other forms of relief, plaintiffs sought compensatory damages from the defendant.[43] AT&T claimed the "filed rate" doctrine barred their claims, but plaintiffs asserted their claims did not implicate the doctrine because they merely challenged AT&T's alleged nondisclosure and deceptive advertising practices, and not the reasonableness of the underlying rates.[44] The court dismissed plaintiffs' state claims for damages in its entirety based upon the "filed rate" doctrine, stating that calculation of the damages plaintiffs sought would necessarily require the court to determine a reasonable rate in direct contravention of the "filed rate" doctrine.[45] The United States Court of Appeals for the Second

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[42] 938 F. Supp. 1158, 1164 (S.D.N.Y. 1996).

[43] *Id.*

[44] *Id.* at 1170.

[45] *Id.* at 1172.

Circuit affirmed the decision on appeal.[46] Other courts have dismissed similar actions under the "filed rate" doctrine.[47]

Respondent AT&T cites the *Marcus* case and related decisions in support of its federal preemption argument.[48] This contention, however, is without merit, simply because this case does not implicate the "filed rate" doctrine. Under Section 203 of the Federal Communications Act of 1934 (FCA), all telecommunications common carriers are required to file tariffs with the FCC.[49] Most telecommunications carriers, including long distance telephone service providers, come within the meaning of "common carrier," which is broadly defined as "any person engaged in rendering communication service for hire to

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[46] *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998).

[47] *See Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994); *Cahnmann v. Sprint Corp.*, 961 F. Supp. 1229 (N.D. Ill. 1997) *aff'd*, 133 F.3d 484 (1998); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (1997).

[48] Respondent called the Court's attention to a recent United States Supreme Court decision, *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, U.S., 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), which reversed a ruling of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had affirmed a magistrate judge's award of damages on state law claims despite the existence of a filed tariff, stating "because this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed rate doctrine does not apply." *Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 990 (9th Cir. 1997). In reversing the Ninth Circuit, the Supreme Court reasoned that "rates do not exist in isolation . . . [but] have meaning only when one knows the services to which they are attached." Accordingly, the Court ruled the fact services and billing are involved instead of rates or ratesetting does not make the filed rate doctrine inapplicable. *American Tel. & Tel. Co.*, 118 S. Ct. at 1963.

[49] 47 U.S.C. 203(a).

the public."[50] Thus, as required under Section 203(a) of the FCA, the defendants AT&T, NYNEX, and Sprint in *Marcus, Wegoland, Cahnmann* and *Porr* each had tariffs on file with the FCC.

In this case, Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One, are cellular telephone service providers, broadly characterized as commercial mobile radio service providers, and are specifically exempted from tariff filing requirements by the FCC.[51] Because there is no tariff filing requirement, the reasonableness of rates charged by commercial mobile radio service (CMRS) providers is not determined by the FCC.[52] Accordingly, not only are there

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[50] 47 C.F.R. 101.3 (1997).

[51] Section 332 of the FCA which governs "mobile services" construes cellular telephone service providers as common carriers, and thus companies providing cellular services are subject to many of the same regulations as long distance telephone service providers. 47 U.S.C. 332(c)(1)(A). For example, cellular telephone service providers must furnish service to all customers upon reasonable request and may not charge rates or engage in practices that are unjust or unreasonable. 47 U.S.C. 201, 202. However, cellular telephone service providers and other similar mobile entities, commonly referred to as "Commercial Mobile Radio Service" (CMRS) providers, are specifically exempted from complying with Section 203 (section requiring tariff filing). 47 C.F.R. 20.15(a), (c) (1997); *see* 47 C.F.R. 20.3 (1997) for a definition of CMRS and 20.9(a), for a listing of the 13 mobile services currently considered by the FCC to be CMRS. Also, in an exhaustive FCC order implementing various provisions of the FCA's 1993 amendments, the FCC concluded that sufficient competition in the cellular marketplace obviates any need for conventional regulation and decided to "forbear from imposing any tariff filing obligations upon CMRS providers." Second Report and Order, In the Matter of Implementing of Sections 3(n) and 332 of the *Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 and 1478 (1994).

[52] 47 C.F.R. 20.15(a), (c).

no tariffs on file, but the two purposes behind the "filed rate" doctrine preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged do not apply in this case.[53] The authorities relied upon by Respondent AT&T are thus not applicable.

In addition, AT&T claims the recent Court of Appeals, Division I, case, *Hardy v. Claircom Comm's. Group, Inc.*, is controlling, although AT&T rests its argument on preemption and concedes the "filed rate" doctrine is not directly applicable.[54] In *Hardy*, both defendants Claircom and GTE had tariffs on file with the FCC, and accordingly, to the extent dismissal was predicated upon the "filed rate" doctrine, the court's decision was correct.[55] However, there was a period of five months during which Claircom's tariff was not filed, and the court correctly used preemption analysis to resolve the case during that brief period.[56]

Federal Preemption

Recognizing the rapid growth of the cellular telecommunications industry, Congress in 1993 amended the FCA, 47 U.S.C. §§ 151-229 to provide a comprehensive and uniform federal regulatory framework for all commercial mobile

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[53] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[54] Br. of Resp'ts at 16-17.

[55] *Hardy*, 86 Wash. App. at 493. Air-to-ground radio mobile service providers are subject to greater regulatory control than other CMRS providers, and thus are required to file tariffs with the FCC.

[56] 86 Wash. App. at 495-96.

radio service (CMRS) providers.[57] To accomplish its objective of regulatory uniformity and deregulation of CMRS, Congress amended Section 332 of the FCA to provide:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. According to the FCC, implementing preemption rules will serve an important purpose: to "help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede the federal mandate for regulatory parity."[58] AT&T asserts 47 U.S.C. sec. 332(c)(3)(A) preempts all of Appellants' state law claims.

The doctrine of preemption originates from the Supremacy Clause in Article VI of the United States Constitution, which generally results in declaring invalid state laws that are contrary to or interfere with the laws of Congress.[59] The principal inquiry in preemption analysis is Congress' objective or purpose in enacting a law.[60] The intent of Congress may be expressly

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[57] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002, 107 Stat. 312, 387-97 (1993).

[58] *Second Report and Order*, 9 FCC Rcd at 1421.

[59] U.S. Const. art. VI, cl. 2; *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 2481, 115 L. Ed. 2d 532 (1991).

[60] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992).

stated in a statute or implicitly contained in its structure and design.[61] If Congress enacts a provision defining the preemptive reach of a statute, matters beyond that expressed scope are not preempted.[62]

Appellants argue the express language of Section 332 itself, which defines the FCA's preemptive reach, allows states to regulate "the other terms and conditions of commercial mobile service" that do not relate to market entry or rate regulation.[63] They assert these "other terms and conditions" include a carrier's "advertising, marketing and contracting, which are distinct from the federally regulated issues of rates and entry."[64] A Congressional House Report on the Omnibus Budget Reconciliation Act of 1993 tends to support Appellants' contention:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protections matters . . .[65]

At least one United States District Court that addressed the "terms and conditions" clause of Section 332 concluded the

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[61] *Id.*

[62] *Id.* at 517.

[63] Br. of Appellants at 6. *See* 47 U.S.C. 332(c)(3)(A).

[64] Br. of Appellants at 10.

[65] H.R. REP. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588.

clause "permits state regulation of cellular telephone service providers in all areas other than the providers' entry into the market and the rates charged to their customers."[66]

Appellants additionally claim the "savings clause" in Section 414 of the FCA indicates Congressional intent to preserve state law actions that do not challenge market entry or rates charged to subscribers.[67] 47 U.S.C. sec. 414 provides:

> Nothing in the chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Some courts have cited this provision in ruling against preemption of state law claims for charges involving billing or advertising practices.[68] As Respondent AT&T contends, these cases, although factually similar, are not directly on point because they involve the question whether cases should be removed from state courts to federal courts and remain in those courts under the complete preemption doctrine.[69]

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[66] *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 552 (D.N.J. 1996); *see also Mountain Solutions, Inc. v. State Corp. Comm'n*, 966 F. Supp. 1043, 1048 (D. Kan. 1997).

[67] Br. of Appellants at 7. *See* 47 U.S.C. 414.

[68] *Bennett v. Alltel Mobile Communications of Alabama, Inc.*, No. 96-D-232- N, slip op. at 11 (M.D. Ala. 1996); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439 (D.N.J. 1996); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997); *DeCastro*, 935 F. Supp. at 551.

[69] Br. of Resp'ts at 22-27. "Complete preemption" is a related but different procedural doctrine than ordinary preemption and is invoked to determine whether a state law claim should be moved to federal court or whether the claims in federal court should be remanded to state court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55

The courts in *Bennett, Sanderson and DeCastro*, applying 47 U.S.C. sec. 332(c)(3)(A), each ruled against complete preemption of plaintiffs' state law claims and remanded the cases to state courts.[70] Thus, the savings clause in Section 414, together with the "terms and conditions" clause in Section 332, defeats preemption in favor of preserving state law claims that do not attack or regulate market entry or rates.[71]

The gravamen of Respondent AT&T's argument, however, is that Appellants' request for monetary damages requires a court to retroactively establish new rates in determining damages, which, in effect, is state rate-making explicitly preempted by 47 U.S.C. sec. 332(c)(3)(A) of the FCA.[72] Appellants assert they only challenge AT&T's inadequate disclosure practices in connection with billing, and do not

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(1987). This doctrine provides that, in limited situations, ordinary common law complaints can be converted into federal claims when the preemptive force of a federal statute is sweeping and extraordinary. *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 814-15 (N.D. Cal. 1991). The United States Supreme Court has stressed the limited scope of this doctrine, finding complete preemption in only two instances: under 301 of the Labor Management Relations Act and under 502(a) of the Employee Retirement Income Security Act of 1974. *DeCastro*, 935 F. Supp. at 549.

[70] *Bennett*, No. 96-D-232-N at 14; *Sanderson*, 958 F. Supp. at 956-58; *DeCastro*, 935 F. Supp. at 554-55.

[71] Congress could have, if it desired, completely preempted state law by stating that 332(c)(3)(A) would preempt all state laws that related to the rates charged, instead of providing for preemption only where state law regulates "the entry of or the rates charged" by CMRS providers. Compare ERISA's broader preemption clause which states that the law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .." 29 U.S.C. 1144(a).

[72] Br. of Resp'ts at 6.

contest the reasonableness or legality of the underlying rates.[73] AT&T counters by stressing that Appellants' claim is essentially a disguised form of attack on the reasonableness of its rates.

As authority for its contention, Respondent AT&T first cites three class action rounding cases that were dismissed by various courts.[74] Those cases, however, do not significantly support AT&T's position. *Rogers*, an Indiana Superior Court case, is a cursory order devoid of facts or legal analysis.[75] In *Simons*, a case before the United States District Court for the Southern District of Texas, Respondent AT&T itself stated in its brief that the plaintiffs "challenged the reasonableness of early termination fees," which made it proper for the court to dismiss on preemption grounds.[76] And in *Powers*, a San Diego County Superior Court case, the plaintiffs claimed in their complaint that they were damaged by defendant's "methods of determining or calculating the quantity of chargeable airtime

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[73] Br. of Appellants at 5.

[74] *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Ind. Super. Ct. July 1, 1996) (superior court dismissed class action concluding it did not have jurisdiction because the remedy requested by plaintiffs would require a change of rates and should therefore be heard by the FCC or a federal court); *Simons v. GTE Mobilnet*, No. H-95-5169 (S.D. Tex. April 11, 1996) (court dismissed case as preempted by the FCA where plaintiffs challenged the reasonableness of early termination fees in cellular service contracts); *Powers v. Airtouch Cellular*, No. N71816 (San Diego County. Super. Ct. Cal. Oct. 6, 1997) (case dismissed because although plaintiffs alleged suit was based on defendant's alleged failure to disclose "teardown charges," the real focus was on the legality or reasonableness of those charges.)

[75] *Rogers*, at 1-2.

[76] Br. of Resp'ts at 19.

usage," which, as the court found, seemed more like an attack on rates than a challenge to inadequate disclosure.[77]

In this case, Appellants do not contend they were injured by AT&T's practice of rounding its airtime. Instead, they only claim they were damaged by AT&T's inadequate disclosure concerning that practice. They assert this type of claim, which alleges fraud or deceptive advertising and not the reasonableness of rates, should not be preempted. They cite several cases in support of their position.[78]

Appellants also cite *Kellerman v. MCI Telecomm's. Corp.*[79] In that case, plaintiffs, seeking damages, brought a class action against their long distance telephone service provider for breach of Illinois' consumer fraud and deceptive trade practices acts, claiming that certain of defendant's advertisements and promotional materials were fraudulent and deceptive.[80] The Illinois Supreme Court held the state law claims were not

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[77] *Powers*, at 1.

[78] *In re Long Distance Telecomm's. Litig.*, 831 F.2d 627 (6th Cir. 1987) (in plaintiff's fraud claims arising from defendant's alleged failure to disclose its practice of charging long distance customers for uncompleted calls, ring time and holding time, court held the state law claims were not preempted because they did not conflict with the FCA and were within the conventional experience of the courts); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985) (court denied motion to dismiss claims for fraud and unfair trade practices involving alleged overcharges for phone services); *American Inmate Phone Sys., Inc. v. US Sprint Comm's. Co.*, 787 F. Supp. 852 (N.D. Ill. 1992); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996).

[79] 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986).

[80] *Kellerman*, 493 N.E.2d at 1047-48.

preempted, relying on the FCA's savings clause, Section 414, concluding:

> The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long distance telephone service.[81]

Appellants additionally cite *DeCastro v. AWACS, Inc.*[82] In that case, plaintiffs brought a class action against defendant, a cellular telephone service provider, making various state law claims relating to defendant's inadequate disclosure concerning certain billing practices.[83] The case was removed to federal court on defendant's motion, but the court remanded, ruling that the FCA does not provide an enforcement mechanism for claims involving failure to disclose billing practices, stating:

> These two claims center around Comcast's alleged failure to disclose a particular billing practice; they do not challenge the billing practice as unreasonable or contrary to law, nor does their resolution require a court to assess the reasonableness of the defendant's billing practice.[84]

Kellerman and *DeCastro* both conclude that the FCA does not displace, but instead supplements, state law claims against service providers for misrepresentation, fraud and unfair billing

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[81] *Id.* at 1051.

[82] 935 F. Supp. 541 (D.N.J. 1996).

[83] *Id.* at 545.

[84] *Id.* at 550.

practices.[85] The FCC itself has stated that the savings clause, Section 414:

> Preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers.[86]

AT&T challenges those cases as not constituting direct authority for the issue now before this Court. AT&T correctly notes that many of those cases were decided before Congress amended Section 332, and do not therefore refer to that provision; and that other cases involve the "complete preemption" doctrine, a related but different analysis than preemption under the explicit language of Section 332. Those cases nevertheless offer some support for Appellants' assertion that their state claims are not preempted.

Respondent AT&T also cites cases which offer support for its position, but those cases are not directly on point. Respondent cites authorities which stand for the proposition that damage awards are tantamount to rate regulation.[87] But in

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[85] *Kellerman*, 493 N.E.2d at 1051; DeCastro, at 554.

[86] *In re Operator Servs. Providers of Am.*, 6 FCC Rcd 4475, 4477 (1991); *see also In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 10 FCC Rcd 13639, 13641 (1995) (section 414 preserves claims against carriers as against other corporations, such as liability for misleading advertising).

[87] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 101 S. Ct. 2925, 2931, 69 L. Ed. 2d 856 (1981) (damage actions are disguised retroactive rate adjustments and thus barred by filed rate doctrine); *Chicago and N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323, 101 S.

each of those cases, either the harsh rule of the "filed rate" doctrine was implicated or the claims were found to be completely preempted by the regulatory agency's exclusive and plenary authority.

In *Hardy v. Claircom Communications Group, Inc.*, the Court of Appeals, Division I, properly relied upon the "filed rate" doctrine to dismiss all of plaintiffs' claims arising under it.[88] However, for the five-month period during which there was no tariff on file, the court held that Section 332 preempted it, stating, "Hardy's claims implicate not only the advertising practices of AT&T Wireless but also the reasonableness of the carrier charging the tariff rate in light of those practices."[89] The court concluded the claims are preempted because Hardy is challenging the reasonableness of the tariff "in light of those practices."[90] But there was no tariff filed for the five-month period.[91] And the court used Section 332 preemption analysis

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Ct. 1124, 1133, 67 L. Ed. 2d 258 (1981) (state court action dismissed where Interstate Commerce Commission's authority under the Interstate Commerce Act to regulate abandonments is exclusive and plenary); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121 (S.D.N.Y. 1992) (damages award would require a court to determine a reasonable rate); *Weinberg v. Sprint Corp.*, No. BER-L-12073-95 (N.J. Sup. Ct. 1996) (a court's calculation of prorated rate for calls consisting of less than one minute amounts to a statement that phone companies should charge subscribers by the second in direct conflict with FCC determinations that rounding up is legitimate).

[88] 86 Wash. App. 488, 495, 937 P.2d 1128 (1997).

[89] *Id.* at 495.

[90] *Id.* at 496.

[91] *Id.* at 495.

solely to address the "5-month period during which AT&T Wireless concededly had no filed tariff in place."[92]

Respondent now argues that cases have held that damages implicate rate adjustment and are tantamount to rate regulation; and even though those cases involved the "filed rate" doctrine, that reasoning should be extended to dismiss claims requesting damages because, although there is no "filed tariff," the language of 47 U.S.C. sec. 332(c)(3)(A) preempts rate regulation.

The position of Appellants, though, is bolstered by *Nader v. Allegheny Airlines, Inc.*[93] In that case the plaintiff was denied boarding or "bumped" from his reserved and confirmed seat on Allegheny Airlines because the airline had overbooked its flights.[94] Instead of accepting "denied boarding compensation," plaintiff brought a common law action in the United States District Court for the District of Columbia claiming fraudulent misrepresentation because defendant did not disclose its deliberate overbooking practices[95]. The plaintiff was not contesting the reasonableness of the overbooking practice itself, but only the nondisclosure of it. The District Court found for the plaintiff, but the United States Court of Appeals for the District of Columbia reversed, ruling that the matter must be referred to the Civil Aeronautics Board (CAB) to determine whether defendant's alleged failure to disclose its deliberate

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[92] *Id.*

[93] 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976).

[94] *Nader*, 426 U.S. at 292-94.

[95] *Id.* at 294-95.

overbooking practice is deceptive.[96] The Court reversed mainly on primary jurisdiction grounds, but did address an issue relevant to this case.

The Supreme Court in *Nader* noted that the Court of Appeals relied on *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.* for its conclusion.[97] Abilene is a "filed rate" doctrine case which dismissed a state law action that challenged a published carrier rate as "unjust and unreasonable" by reasoning that an action for damages attacking the reasonableness of federally regulated rates would undermine the purpose of the Interstate Commerce Act.[98] The Court in *Nader* distinguished *Abilene* on the grounds that in *Nader* there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies."[99] In *Abilene*, the carrier would be put in an "untenable position" because it "could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive."[100] The Court in *Nader* noted that in such a case, "the conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous." [101] The Court then stated that in the case before it, the Court "in contrast, is not called upon to substitute its judgment for the agency's on

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[96] *Id.* 295-97.

[97] *Texas & Pac. R. Co. v Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907). *Nader*, 426 U.S. at 298.

[98] *Nader*, at 298-99 (discussing *Abilene*).

[99] *Id.* at 299.

[100] *Id.*

[101] *Id.*

the reasonableness of a rate."[102] That was because there was no tariff provision requirement that airlines engage in or disclose the practice of overbooking.[103] The Court concluded any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental." [104] Thus, the Supreme Court reversed, holding that because the action "does not turn on a determination of the reasonableness of a challenged practice," but only on the issue of disclosure of that practice, "the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts."[105]

Similarly, in this case, the FCC does not require CMRS providers such as Respondent AT&T to file tariffs.[106] AT&T does not dispute that billing and advertising practices are not governed exclusively by the FCA, if at all. This is a question we need not consider. Appellants do not attack the reasonableness of AT&T's practice of rounding up call charges. They challenge only nondisclosure of the practice. *Nader* addresses the precise issue now before this Court. We consider it applicable authority.

There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has

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[102] *Id.*

[103] *Id.* at 300.

[104] *Id.*

[105] *Id.* at 305.

[106] 47 C.F.R. 20.15(a), (c).

observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate."[107] Any court is competent to determine an award of damages.[108]

Primary Jurisdiction

In dismissing Appellants' complaint, the King County Superior Court concluded their state law claims were preempted by Section 332 of the FCA "and/or that the doctrine of primary jurisdiction requires that plaintiffs claims be referred to the FCC."[109]

"Primary jurisdiction" is a doctrine which requires that issues within an agency's special expertise be decided by the appropriate agency.[110] Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court involves issues that fall within the scope of a pervasive

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[107] *Nader*, 426 U.S. at 299. *See also Bennett v. Alltel Mobile Comm's. of Ala., Inc.*, No. 96-D-232-N, slip op. at 6 (1996).

[108] The conclusion that Appellants' claims are not preempted by Section 332 is limited to that question and does not address the merits of the case.

[109] Order of Dismissal. Clerk's Papers at 279.

[110] *Vogt v. Seattle-First Nat'l Bank*, 117 Wash. 2d 541, 554, 817 P.2d 1364 (1991); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956).

regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.[111]

Respondent AT&T asserts the doctrine of primary jurisdiction requires that this matter be decided by the FCC. The basis of AT&T's argument is no different than its contention concerning preemption Appellants' request for damages in effect requires a court to engage in rate regulation in determining a reasonable charge for partial minutes of airtime and thus it should be referred to the FCC which has special competence and expertise in rate regulation. AT&T cites several cases to support its position. We do not consider those cases persuasive.[112] Issues which call into question the legality or reasonableness of a carrier's rates should properly be referred to the FCC. In our discussion on preemption we have already concluded that Appellants' state law claims for nondisclosure did not constitute a challenge to the reasonableness of the rates, notwithstanding that they were requesting damages.

Appellants cite cases which hold that matters not pertaining to tariffs or rates do not require agency expertise, but fall within the conventional competence of courts without the need for

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[111] *In re Real Estate Brokerage Antitrust Litig.*, 95 Wash. 2d 297, 302-03, 622 P.2d 1185 (1980).

[112] *Smith v. Spring Comm's. Co.*, No. 96-2067 (N.D. Calif. 1996); *AT&T v. IMR Capital Corp.*, 888 F. Supp. 221, 224 (D. Mass. 1995); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997). *See also Kaplan v. ITT-U.S. Transmission Sys., Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984), which supports AT&T's position. The plaintiff in that case brought suit claiming nondisclosure of charges for unanswered telephone calls. The United States District Court dismissed the case on primary jurisdiction grounds, stating that although "the plaintiff in this case is not challenging the reasonableness of a rate or tariff directly, he is challenging the reasonableness of a particular practice defendant's nondisclosure policy . . .." *Kaplan*, 589 F. Supp. at 732-33.

referral to the FCC.[113] In *Nader* v. *Allegheny Airlines, Inc.*, plaintiff brought common law actions against defendant Allegheny Airlines over nondisclosure of its overbooking practices. The Supreme Court held the doctrine of "primary jurisdiction" did not require the misrepresentation claim to be referred to the regulatory agency, the Civil Aeronautics Board (CAB).[114] The Court stated:

> The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.[115]

Similarly, in this case there is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in *Nader*, Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also,

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[113] *National Comm's. Ass'n v. AT&T Co.*, 46 F.3d 220 (2d Cir. 1995); *Kellerman v. MCI Telecomm's. Corp.*, 134 Ill. App. 3d 71, 479 N.E.2d 1057, 89 Ill. Dec. 51 (1985), *aff'd*, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986); *Pace Membership Warehouse, Inc. v. US Sprint Comm's. Co.*, No. 90- F-2121, 1991 U.S. Dist. LEXIS 19788 (D. Colo. Feb. 8, 1991); *Source Assocs., Inc. v. MCI Telecomm's. Corp.*, 1989 WL 134580 (D. Kan. 1989); *Redding v. MCI Telecomm's. Corp.*, No. C-86-5498-CAL, 1987 U.S. Dist. LEXIS 16073 (N.D. Cal. Sept. 29, 1987).

[114] *Nader*, 426 U.S. at 292-95, 304-05.

[115] *Id.* at 305-06.

although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS infrastructure to rigid control.[116] Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

AT&T also argues FCC jurisdiction is appropriate because an award of damages would violate "47 U.S.C. sec. 202, which specifically prohibits price discrimination among customers."[117] In making this argument, however, AT&T overlooks the fact that the price discrimination must first be "unjust or unreasonable."[118] 47 U.S.C. sec. 202(a) states, in relevant part, "It shall be unlawful for any common carrier to make any *unjust or unreasonable* discrimination in charges, practices . . . or services for or in connection with like communication service . . . ." (Emphasis added.)

Section 202 has traditionally been used by companies in filing complaints with the FCC to allege discriminatory practices by carriers charging different rates for like services or used by the FCC in rejecting tariff filings that attempted to charge different prices for like services.[119] Courts have used a three-

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[116] *See Second Report and Order*, 9 FCC Rcd at 1413, 1418, 1478 (although there is congressional intent to create regulatory symmetry among CMRS, sufficient competition in the cellular marketplace obviates any need for conventional regulation and thus CMRS providers are exempt from tariff filing requirements).

[117] Br. of Resp'ts at 40-41.

[118] 47 U.S.C. 202(a).

[119] *American Broad. Cos. v. F.C.C.*, 213 U.S. App. D.C. 369, 663 F.2d 133 (D.C. Cir. 1980); *Ad Hoc Telecomm's. Users Comm. v. F.C.C.*, 220 U.S. App. D.C. 241, 680 F.2d 790 (D.C. Cir. 1982); *MCI Telecomm's. Corp. v.*

part test in determining whether a carrier is discriminating in violation of Section 202(a): (1) whether the services are "like"; (2) if so, whether there is a price difference between them; and (3) if there is such a difference, whether that difference is unreasonable.[120] The significant inquiry is whether two services are "like." In making this determination, courts use an FCC developed test known as the "functional equivalency test."[121] Under this test, the focus of the inquiry centers on whether the services in question are "different in any material functional respect."[122]

AT&T relies on two authorities for its argument, but both are "filed rate" doctrine cases and thus offer no significant support.[123] Accordingly, because Appellants do not challenge a practice requiring technical and expert evaluation by the FCC, and because Section 202 does not apply, we conclude the

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F.C.C., 286 U.S. App. D.C. 316, 917 F.2d 30 (D.C. Cir. 1990).

[120] *MCI Telecomm's. Corp.*, 917 F.2d at 39; *Competitive Telecomm's. Ass'n v. F.C.C.*, 302 U.S. App. D.C. 423, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *American Message Ctrs. v. FCC*, 311 U.S. App. D.C. 64, 50 F.3d 35, 40 (D.C. Cir. 1995).

[121] *American Broad. Cos.*, 663 F.2d at 138; *Ad Hoc Telecomm's. Users Comm.*, 680 F.2d at 795; *MCI Telecomm's. Corp.*, 917 F.2d at 39.

[122] *American Broad. Cos.*, 663 F.2d at 138 (quoting *American Trucking Ass'n v. F.C.C.*, 126 U.S. App. D.C. 236, 377 F.2d 121, 127 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S. Ct. 973, 17 L. Ed. 2d 874 (1967)).

[123] *Gelb v. AT&T Co.*, 813 F. Supp. 1022, 1029-31 (S.D.N.Y. 1993), *aff'd*, 138 F.3d 46 (2d Cir. 1998; *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996); see also *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 74 Cal. Rptr. 2d 55 (1998) (injunctive relief is permissible but "filed rate" doctrine bars any monetary recovery).

matter need not be referred to the FCC under the doctrine of "primary jurisdiction."

SUMMARY AND CONCLUSIONS

The King County Superior Court dismissed Appellants' complaint concluding the case was controlled by *Hardy v. Claircom Comm's. Group, Inc.*, and preempted by 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of "primary jurisdiction." The ruling in Hardy principally involved the "filed rate" doctrine. AT&T cites "filed rate" doctrine cases in support of its position. In this case, however, AT&T as a commercial mobile radio service provider is specifically exempted from tariff filing requirements and thus those cases are not materially significant.

The language of Section 332 itself, contained in the "terms and conditions" clause, limits the preemptive reach of that provision. The savings clause, Section 414, is indicative of the intent of Congress to preserve state law claims for billing or advertising which do not attack market entry or rates charged by commercial mobile radio service (CMRS) providers.

The United States Supreme Court in *Nader v. Allegheny Airlines* concluded a challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a practice or rate expressly regulated by an agency and that any impact on rates is "merely incidental." A court may award damages without it constituting rate making.

The doctrine of "primary jurisdiction" requires that a court refer issues within an agency's special expertise to the appropriate agency for an initial determination. Because Appellants' claims do not challenge the rates charged by AT&T nor any other technical practice requiring Federal Communications Commission (FCC) expertise, the matter falls

within the conventional competence of the courts without the need for referral to the FCC.

We reverse the judgment of the King County Superior Court which dismissed Appellants' class action complaint on a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A), the doctrine of "primary jurisdiction" and the Court of Appeals decision in *Hardy v. Claircom Communications, Inc.*

DURHAM, C.J., and DOLLIVER, GUY, JOHNSON, MADSEN, ALEXANDER, TALMEDGE and SANDERS, JJ., concur.

APPENDIX B

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiff, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendant.	NO. 95-2-27642-3SEA ORDER OF DISMISSAL

This matter was brought on for hearing by Defendants' Motion to Dismiss Based on Federal Preemption of State Law Claims and the Doctrine of Primary Jurisdiction ("Defendants' Motion"). This Court has considered the Defendants' Motion and Reply in Support of that Motion together with all supporting pleadings or exhibits; Plaintiffs' Opposition to Defendants' Motion to Dismiss; Declaration of Erin K. Flory in Opposition to Defendants' Motion to Dismiss; Appendix of Documents in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss; Plaintiffs' Workpapers in Opposition to Defendants' Motion to Dismiss; the pleadings and papers on file with the Court; and the oral argument presented by the parties.

The Court concludes as a matter of law that this case is controlled by *Hardy v. Claircom* and therefore that the plaintiffs' state law claims are preempted by 47 U.S.C. § 332(c)(3)(A); and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the Federal Communications Commission. NOW, THEREFORE:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that plaintiffs' Complaint is hereby dismissed with prejudice.

DATED this 13th day of June, 1998.

/s/
Hon. J. Kathleen Learned

Presented by:

STOKES, EITELBACH
& LAWRENCE, P.S.

By /s/
Michael E. Kipling (#07677)
Laura J. Buckland (#16141)
Kelly Twiss Noonan (#19096)
Attorneys for Defendants

APPENDIX C

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiffs, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendants.	NO. 95-2-27642-3SEA SECOND AMENDED CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, COMMON LAW FRAUD, AND VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT

Plaintiffs, by their attorneys, for their complaint allege upon personal knowledge and belief as to their own acts and upon information and belief as to all other matters, based upon investigation of counsel, as follows.

I. NATURE OF ACTION

1. This is a class action brought on behalf of a class of subscribers to AT&T Wireless ("AT&T") cellular services in AT&T's Northwest region. This region encompasses, in addition to the state of Washington, the states of Idaho, Utah, Oregon and Alaska. Members of the proposed class also include

former cellular subscribers with McCaw Cellular Communications d/b/a Cellular One ("McCaw"), who are no longer customers of Cellular One or who are now being provided service by AT&T as a result of the merger of McCaw and AT&T.

2. In order to induce cellular customers to use its cellular service, and/or in order to unfairly profit, defendants engaged, and in the case of AT&T are still engaging, in deceptive, fraudulent, misleading and/or unfair conduct arising from their practice of charging for a full minute of airtime even if a subscriber is connected for just one second. For example, if a subscriber to defendants' cellular service places a phone call that lasts for a total of one minute and one second, the subscriber is billed for two minutes. This billing practice, known in the cellular industry as "rounding" or "full minute billing," results in millions of dollars of excess billing by AT&T and McCaw all at the expense of the unwary customer. The practice of "rounding" is contrary to the "Service Agreement" that AT&T and McCaw enters into with many of its subscribers, which states that the customer is billed only from "*the time you press send until the time you press end.*" The Service Agreement does not disclose or permit rounding.

3. Rounding also means that cellular consumers do not get the full *minutes* they have contracted for at a fixed rate under their applicable service plan. All subscribers must choose between plans that offer a specified number of minutes of airtime, *e.g.*, 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate. Rounding results in subscribers not receiving the full *airtime* for which they paid under their basic plan. For example, in a 30-minute plan, due to rounding, a consumer might actually receive only twenty minutes or less of actual airtime. AT&T conceals this from consumers and is at this moment continuing to promulgate advertisements to the effect that a consumer receives "30 local

minutes of airtime every month" for subscribing to the $29.99 monthly plan, when in fact, due to rounding, consumers do not receive 30 minutes of airtime.

4. Plaintiffs seek, individually and on behalf of the Class, injunctive and monetary relief, including (a) an order enjoining defendant AT&T from charging consumers based on the practice of rounding up without disclosing the practice; and (b) compensatory damages in the form of a refund of the difference between the amounts charged by AT&T and/or McCaw and the amount, if any, which cellular users would have incurred if AT&T and McCaw did not engage in this practice.

5. The practices complained of herein are of a universal nature and equally affect all members of the plaintiff Class.

6. Plaintiffs do not seek to change, diminish, or modify the rates being charged by AT&T or formerly by McCaw pursuant to filings, if any, with any governmental regulatory agency. Plaintiffs do not seek any relief which would disturb the uniformity of rates charged by AT&T.

II. JURISDICTION AND VENUE

7. The claims asserted herein arise under common law and the Washington Consumer Protection Act.

8. This Court has jurisdiction over the parties because plaintiffs submit to the jurisdiction of the Court, and defendants are headquartered in King County, Washington, are licensed or authorized to do business in King County, Washington, and/or have, within the relevant time periods, transacted business in King County, Washington. This Court has jurisdiction over the subject matter of the suit because the events complained of occurred in King County, Washington.

9. Venue is proper in this Court, pursuant to RCW 4.12.025, because defendants transact or have transacted business in King

County, Washington and maintain offices in King County, Washington.

III. THE PARTIES

10. Plaintiff Coryelle Tenore signed a service agreement with Cellular One and now has her service provided by AT&T. Her service was activated on January 15, 1995, and is for a one-year period.

11. Plaintiff Charles F. Peterson executed a subscription agreement for AT&T cellular services on July 15, 1995.

12. Plaintiff Karen M. Cole executed a subscription agreement for AT&T cellular services on September 26, 1995.

13. Defendant McCaw Cellular Communications, Inc. d/b/a Cellular One, until its merger with AT&T, was the largest seller of cellular services in the United States. It operated throughout the country under the name Cellular One. McCaw is headquartered in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at McCaw's headquarters in King County, Washington.

14. Defendant AT&T Wireless is a wholly owned subsidiary of telecommunications giant AT&T Corporation and has its headquarters in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at AT&T's headquarters in King County, Washington.

IV. CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action pursuant to Rules of Procedure 23(b)(1), (2) and 23(b)(3) on behalf of the following class:

All current and former AT&T and Cellular One subscribers in the states of Washington, Idaho, Utah, Oregon, and Alaska who have been billed for cellular service by AT&T or Cellular One and have been subject to having their airtime charges rounded up to the next full minute, when their service agreement or contract provided that they would be billed from "send to end" or contained similar language indicating that they would be billed only for actual airtime. The Class includes subscribers who originally contracted with McCaw Cellular d/b/a Cellular One but who became subscribers of AT&T when the two companies merged, and subscribers of Cellular One who did not become subscribers of AT&T. Excluded from the Class are all subscribers who were or are employees or officers of AT&T and McCaw.

16. Plaintiffs seek injunctive, compensatory and declaratory relief on behalf of the Class.

17. There are many thousands of members of the Class. AT&T and McCaw has or had revenues in the hundreds of millions of dollars as a result of cellular services. The exact number of members of the Class is presently unknown to plaintiffs but may be determined from records maintained by McCaw and AT&T as both send monthly bills to members of the proposed Class..

18. Plaintiffs are members of the Class. Plaintiffs' claims are substantially identical to and typical of the claims of members of the proposed Class.

19. Plaintiffs and plaintiffs' counsel (who are experienced in class action litigation) will fairly and adequately protect the interests of the Class.

20. Questions of fact and law common to the Class include, *inter alia*:

a. whether defendants have engaged and are engaging in the unlawful, deceptive, fraudulent, and/or misleading conduct alleged herein;

b. whether such conduct violates uniform state consumer protection laws and constitutes misrepresentation, fraud, and breach of contract;

c. whether injunctive relief is appropriate and, if so, what form of injunctive relief is most appropriate; and

d. whether plaintiffs and the members of Class have suffered damages as a result of the conduct alleged herein, and if so, the measure of such damages.

21. Defendants have acted and are acting on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

22. The common questions of fact and law predominate over any individual questions.

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

24. There are no unusual difficulties likely to be encountered in the management of this litigation as a class action. A class action is the only feasible method by which this controversy may be resolved.

25. Notice to the Class may be accomplished cheaply, efficiently and in a manner best designed to protect the due process rights of all Class members by means of written notices supplied as part of McCaw and AT&T's billing procedures.

V. BACKGROUND FACTS

26. Cellular phone service involves a recent technology of mobile radio communication based on a computer-coordinated series of cell sites situated throughout the coverage area. Each

cell site contains a radio transmitter which services a portion of the total coverage area. When a call is placed, the system locates the telephone, establishes a connection through the appropriate cell site and transfers that connection to other cell sites as the telephone moves through the area served by the system.

27. The FCC allocated radio frequencies for cellular services in a manner that allowed for only two cellular systems per market.

28. AT&T is a wholly owned subsidiary of AT&T Corporation and is organized to provide wholesale cellular service in markets serviced by landline carriers affiliated with AT&T. AT&T operates cellular services in virtually all states. In the Puget Sound region it is known as AT&T Wireless, and it includes consumers who were subscribers of McCaw Cellular d/b/a Cellular One, which is now a part of AT&T. Formerly, McCaw operated in numerous geographic regions, including the state of Washington.

29. The limitation of two cellular licenses per market has, unfortunately for consumers, created an immensely profitable oligopoly. Armed with oligopoly, if not monopoly, power, the cellular companies charge steep prices for airtime and feel free to engage in practices, like the ones described herein, that are inherently unfair to consumers.

30. Due to its immense profitability, cellular companies, like McCaw and AT&T, engage in extensive advertising designed to lure in cellular consumers and to induce use of cellular airtime.

31. AT&T (and formerly McCaw) offers consumers a range of billing plans. These plans offer a fixed charge for a specified period of airtime for both personal plans and business plans, *e.g.*, 30, 60 or 90 minutes per month for personal and 500 or 2,000 minutes per month for business plans. For any airtime

beyond the fixed-charge time allotted for each plan, the subscriber is charged at specified rates "per minute."

32. AT&T requires that each customer sign a "Service Agreement," which identifies the package the subscriber selected and constitutes the contract between AT&T and the subscriber. These contracts typically obligate the subscriber for a one or two-year period. McCaw had the same practice.

33. AT&T has the capacity to bill, as it does for its landline services in some circumstances, to the nearest 1/ 10 of a minute, or even to the nearest second of airtime. McCaw also had this capacity.

34. When calculating airtime under any service agreement AT&T rounds up, as did McCaw. For example, if a caller places a call that uses one minute and one second of actual airtime, that caller is billed for two minutes. AT&T always rounds up to the full minute.

35. This practice contradicts the express terms of the Service Agreement of plaintiffs and the other members of the Class, which typically provide:

> **Billing and Payment of Charges....** For answered calls, airtime charges are from the time you press send until the time you press end. [] [Emphasis added, bold in original.]

36. As a result of defendants' practice, plaintiffs and other members of the Class have been overcharged, in that they (1) have not received the fixed-rate airtime allocated under their plan; (2) are not billed down or back to a full minute, but are billed only up or forward to the next highest full minute; and (3) are overbilled for airtime beyond the fixed-rate airtime provided for in their service plan.

37. As a result of this deceptive practice, AT&T takes in millions of dollars in additional charges to which, it is not entitled, and consumers overpay. McCaw also took in millions of dollars in excess charges.

38. AT&T customer service representatives, when questioned about this practice, admit that "it is confusing."

39. In brochures and advertising materials, AT&T routinely represents that the consumer is allowed so many "minutes" of airtime at a fixed monthly charge under the appropriate service plan and is billed thereafter on a per minute basis. McCaw followed the same practice. In fact, because of defendants' practice of "rounding," consumers have received less than their monthly allotment of minutes at the fixed charge. In addition, after exhausting their monthly allotment, they have paid more for additional time than what they would have paid if they were billed only for the minutes of airtime they actually used.

40. For example, when Cellular One would provide information to a prospective subscriber, the subscriber would typically receive a document describing the "Features" of the service plans. A typical brochure contains the following language:

Premier	Frequent user: over 6 calls per day	Digital	Analog
Monthly access		$109.99	$139.99
Minutes included		360	360
Free Premier Club Membership			
ADDITIONAL AIRTIME			
Peak		361-720 30¢	38¢
*Retroactive over 721**		26¢	22¢
Off-peak		5¢	22$
Pacific Northwest Network Roaming		▵30¢	75¢

Premier Club Membership benefits include free Voicemail, 10% off accessories, Personal Account Representative for 720+ users and other special offers.

* All minutes billed at lowest earned rate.

Standard	Average user: 2-5 calls per day	Digital	Analog
Monthly access		$69.99	$86.99
Minutes included		180	180
ADDITIONAL AIRTIME			
Peak		181-360 34¢	181+ 42¢
		361+ 30¢	42¢
Off-peak		10¢	23¢
Pacific Northwest Network Roaming		△34¢	75¢

Occasional	Infrequent user: 0-1 calls per day	Digital	Analog
Monthly access		$24.99	$29.99
Minutes included		30	30
ADDITIONAL AIRTIME			
Peak		31-180 34¢	31+ 52¢
		361+ 30¢	52¢
Off-peak		15¢	25¢
Pacific Northwest Network Roaming		▵42¢	75¢

41. From the this "service plan," an average consumer would reasonably assume that she would receive all of the minutes specified in the second line of each of the foregoing tables for the fixed price. In addition, the consumer would also reasonably assume that, if she spoke for a total of 100 additional minutes, she would be charged only the per-minute rate multiplied by 100. As explained above, this is not the case.

42. AT&T continues to promulgate advertisements that have the capacity to mislead consumers as to the true nature of its charges. For example, in a full page color ad in the November 19, 1995 Seattle Times, AT&T advertised as follows:

A LOW $29.99 MONTHLY RATE

> AT&T cellular service costs just $29.99 per month on a one year contract.
>
> **30 MINUTES INCLUDED**
>
> You get 30 local minutes of airtime each month. So you can call more often.

(Bold in original.)

43. The foregoing advertisement and others like it are deceptive for failing to disclose the practice of rounding. Absent such disclosure the proclamation of "30 minutes included" is misleading and deceptive, because consumers do not get 30 minutes and may get as few as 16 minutes due to rounding.

FIRST CAUSE OF ACTION

Breach of Contract

44. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

45. Plaintiffs and members of the Class contracted for a prescribed amount of airtime and method of charging for airtime, *ie.*, that they would be billed from "Send to End." These were valid contracts. By engaging in the practice of rounding, defendants have breached these contracts, causing plaintiffs and members of the Class damage.

SECOND CAUSE OF ACTION

Negligent Misrepresentation

46. Plaintiffs repeat and reallege the foregoing paragraphs.

47. Defendants have negligently engaged in the deceptive practices, misrepresentations, and material omissions complained of herein in order to induce plaintiffs and members of the Class to incur charges for airtime they did not use. These misrepresentations, or omissions are contained in brochures

describing Cellular One's and AT&T's service plans, the service agreements, and other advertisements using language similar to that set forth above. Justifiable reliance by the classes should be presumed. To the extent McCaw and/or AT&T purports to have disclosed this practice in advertising and promotional brochures, such disclosures are inadequate and do not meaningfully disclose that (1) airtime under the basic service agreement is based on rounding; and (2) airtime after the basic plan time has been exhausted is based on rounding always to the next highest minute.

48. Plaintiffs and the members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

49. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

THIRD CAUSE OF ACTION

Fraud Under Common Law

50. Plaintiffs repeat and reallege the foregoing paragraphs.

51. Defendants have knowingly, and with intent to induce reliance by the class, engaged in the deceptive practices, material misrepresentations, and material omissions complained of herein in order to induce plaintiffs and the members of the Class unknowingly to pay for airtime that they did not use. Justifiable reliance by the class should be presumed.

52. Plaintiffs and members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

53. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

FOURTH CAUSE OF ACTION

Violation of the Washington Consumer Protection Act and Similar State Statutes

54. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

55. Plaintiffs' fourth cause of action is for violation of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.* The Washington Consumer Protection Act should apply to protect all consumers in Washington, Idaho, Utah, Oregon, and Alaska because defendants located their headquarters in Washington, and, on information and belief, the false and/or deceptive representations or omissions of fact in defendants' contracts, brochures, and advertisements disseminated in these states were subject to final approval by defendants' Washington headquarters. The state of Washington has an important interest in ensuring that domestic corporations doing business with non-Washington residents fully comply with Washington laws.

56. Each state within the service area of AT&T and/or McCaw has a statute similar to the Washington Consumer Protection Act. To the extent the Court does not apply Washington's Consumer Protect Act to consumers outside of Washington, plaintiffs bring this claim on behalf of consumers in Idaho, Utah, Oregon, and Alaska asserting the equivalent of Washington's Consumer Protection Act for each such state.

57. Defendants' conduct complained of herein is an unfair act or practice that has the capacity to and does deceive consumers into believing that they are receiving a certain amount of basic airtime when this is not the case.

58. Defendants' conduct occurred in the conduct of trade or commerce or the sale of services.

59. The cellular service industry implicates public interest.

60. All the conduct alleged herein occurs and continues to occur in the course of defendants' business. Defendants' conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

61. Plaintiffs and members of the Class have all been directly and proximately injured in their business and property by defendants' conduct complained of herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request, individually and on behalf of all members of the Class, as appropriate, against defendants, for the damages sustained by reason of each of the causes set forth above, an order providing as follows:

A. An accounting of all monies wrongfully received by defendant as a result of the conduct complained of herein;

B. Compensatory damages in an amount to be determined at trial;

C. Punitive damages in an amount to be determined at trial;

D. Penalties as provided under state Consumer Protection Acts;

E. Requiring defendant AT&T to provide adequate notice of the practice complained of herein and allowing consumers who get the notice to void their contracts with AT&T without penalty;

F. Any other injunctive relief the court deems appropriate;

G. Reasonable attorneys' fees, disbursements and costs of this action, including expert and accounting fees;

H. Such other favorable relief as this Court may deem just, equitable or proper.

DATED: Seattle, Washington
June 3, 1997.

HAGENS & BERMAN, P.S.

By /s/_____
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